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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MALCOLM LLOYD SHEARER,

Defendant and Appellant.

D046321

(Super. Ct. No. SCE238881)

APPEAL from a judgment of the Superior Court of San Diego County, Robert J. Trentacosta, Judge. Affirmed in part; reversed in part and remanded.

Malcolm Lloyd Shearer appeals a judgment sentencing him to the upper term of five years for robbery (Pen. Code, § 211) after his probation for that offense was revoked. He contends the trial court erred by: (1) imposing the upper term based on facts not found by a jury or admitted by him; and (2) imposing an unauthorized sentence because it was based, in part, on an improper factor.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2004, Shearer stole nine DVD's and some candy from a Lemon Grove video store. When a store employee attempted to stop him outside the store, Shearer struck him on the head with a portable DVD player. The employee sustained a quarter-inch laceration. Shearer was apprehended by another employee.

An information charged Shearer with one count of robbery (Pen. Code, § 211). Shearer pleaded guilty to that charge, acknowledging he could be sentenced to a maximum of five years in prison.

In June the trial court suspended imposition of sentence and granted Shearer three years' probation subject to certain terms and conditions, including that he obey all laws.

In November Shearer stole items from a Sav-On store in San Diego.

In December a petition to revoke Shearer's probation was filed, alleging he violated the terms and conditions of his probation by committing burglary and theft offenses during that November incident. The trial court summarily revoked his probation.

In March 2005, an evidentiary hearing was held on the petition to revoke Shearer's probation. The trial court found he had violated the terms and conditions of his probation and sentenced him to the upper term of five years for his March 2004 robbery.

Shearer timely filed a notice of appeal. On December 28, 2005, we issued an opinion affirming the judgment.

On February 20, 2007, the United States Supreme Court granted Shearer's petition for writ of certiorari, vacated our December 28, 2005 judgment and remanded the cause

to us for further consideration in light of *Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856] (*Cunningham*).

On March 28, we directed the parties to file simultaneous letter briefs addressing the effect of *Cunningham* on this case. We subsequently received, and have considered, the parties' supplemental briefs.

DISCUSSION

I

Blakely¹ and Cunningham Error

Shearer contends the trial court erred by imposing the five-year upper term based on facts not found by a jury or admitted by him in violation of *Blakely v. Washington*, *supra*, 542 U.S. 296; *Cunningham*, *supra*, 127 S.Ct. at p. 868; and the United States Constitution. In imposing the upper term, the trial court relied on three factors: (1) Shearer's prior criminal record; (2) his conduct in committing the March 2004 robbery; and (3) his conduct during the November 2004 incident that resulted in revocation of his probation. Shearer asserts the court erred by relying on the latter two factors not found true by a jury or admitted by him.

A

At Shearer's sentencing hearing, the trial court imposed the five-year upper term for his March 2004 robbery, stating:

¹ *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).

"I have listened carefully to the testimony in this case. I have also considered the defendant's record. I will note that *the defendant has three prior felony convictions, [and] at least eight misdemeanor convictions.* By my count, the defendant has five theft-related convictions in Arizona between 1991 and 1996. He has a sexual indecency felony in 1997 for which he was a [Penal Code section] 290 registrant. There was a continuous course of criminal conduct throughout 1997 culminating in a one-year prison commitment for aggravated assault in 1998.

"In [that] case the victim was a 15-year-old girl, in the aggravated [assault] case. The defendant then failed to remain law abiding in 2001, after he was released, having suffered two additional convictions.

"In the underlying case, the case of the [March 2004] robbery, I will note that the defendant's conduct in that case was serious. He was confronted after stealing 10 DVD's from a Hollywood Video. As the manager or loss prevention officer attempted to contact him to gain his compliance, the defendant hit that individual in the head with an object causing a laceration that required sutures for closure.

"In this case, the obvious seriousness of that case, it is somewhat confounding to the court. However, the defendant did receive a local time commitment in that case.

"In short, *the presumptive term in this case, which is three years, would seem to pale in comparison with the defendant's criminal history [and] the conduct in the robbery case for which he is currently on probation. Adding to the mix is the defendant's conduct in [the probation revocation] case.*

"In [the probation revocation] case, he was obviously drinking. The defendant re-entered the store on at least two occasions to steal merchandise, again re-entered the store thereafter, attempted to shoplift some beer, [and] was confrontational with the loss prevention officer. There was at least a threat or at least the loss prevention officer felt a threat of physical violence. Fortunately, that did not occur.

"But the pattern of theft, of confrontation and violence or potential violence is consistent; and in this case the defendant will be committed to the Department of Corrections for the upper term,

based upon his record and the conduct in this case, of five years."
(Italics added.)

B

In *Blakely, supra*, 542 U.S. 296, the United States Supreme Court held Washington's sentencing procedure allowing the trial court to add three years to the defendant's sentence based on an aggravating factor (i.e., deliberate cruelty) not found true by a jury and not admitted by the defendant as part of his guilty plea violated the defendant's Sixth Amendment right to a jury trial. (*Blakely*, at pp. 301-305.) In so doing, the court applied its holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466 that: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490, quoted in *Blakely*, at p. 301.) *Blakely* concluded "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of facts reflected in the jury verdict or admitted by the defendant.*" (*Blakely*, at p. 303.)

Subsequently, in *People v. Black* (2005) 35 Cal.4th 1238, 1258, the California Supreme Court concluded a trial court's imposition of an upper term under California's determinate sentencing scheme based on facts not found by a jury or admitted by a defendant does *not* violate either *Blakely* or the United States Constitution.

However, on January 22, 2007, in *Cunningham, supra*, 127 S.Ct. 856, the United States Supreme Court rejected *Black*. In *Cunningham*, the court noted California's determinate sentencing law (DSL) and relevant sentencing rules "direct the sentencing

court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts--whether related to the offense or the offender--beyond the elements of the charged offense." (*Cunningham*, at p. 862.) Furthermore, "an upper term sentence may be imposed only when the trial judge finds an aggravating circumstance." (*Id.* at p. 868.) *Cunningham* concluded: "In accord with *Blakely*, therefore, the middle term prescribed in California's statutes, not the upper term, is the relevant statutory maximum." (*Ibid.*) Accordingly, *Cunningham* held:

"Because circumstances in aggravation are found by the judge, not the jury, and need only be established by a preponderance of the evidence, not beyond a reasonable doubt [citation], the DSL violates *Apprendi*'s bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.' [Citation.]" (*Ibid.*)

In rejecting the California Supreme Court's contrary conclusion in *Black*, *Cunningham* stated: "Because the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment." (*Cunningham*, at p. 859.)

C

Applying *Blakely* and *Cunningham* to the record in this case, we conclude the trial court violated Shearer's Sixth Amendment right when at least two of the three aggravating circumstances on which it relied in imposing the upper term were neither admitted by Shearer nor found true by a jury beyond a reasonable doubt. Assuming arguendo that the trial court's discussion of and reliance on Shearer's prior criminal record did not require a jury finding because of the exception for the fact of a prior conviction(s)

(see *Almendarez-Torres v. United States* (1998) 523 U.S. 224, 257; *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490 [in imposing an aggravated sentence, "the fact of a prior conviction" need not be proved to a jury beyond a reasonable doubt]), the two remaining aggravating circumstances discussed by and relied on by the trial court in imposing the five-year upper term for Shearer's robbery conviction did not fall within that exception. Rather, under *Blakely* and *Cunningham*, the trial court's discussion of and reliance on Shearer's conduct in, or the circumstances of, the March 2004 robbery required either a jury finding on that conduct or Shearer's waiver of that right to a jury finding. The court considered his specific conduct in that robbery, including Shearer's purported stealing of 10 DVD's from a store and striking of a store employee "in the head with an object causing a laceration that required sutures for closure." However, none of those facts were admitted by Shearer or found true by a jury.

Likewise, under *Blakely* and *Cunningham*, the trial court's discussion of and reliance on Shearer's conduct in the November 2004 incident that led to his probation revocation in this case also required either a jury finding on that conduct or Shearer's waiver of that right to a jury finding. As discussed above, the court discussed Shearer's conduct during the November 2004 incident, including his drinking, attempt to steal beer from a store, and potentially violent confrontation with the store's loss prevention officer. However, none of those facts were admitted by Shearer or found true by a jury.

By relying on two aggravating circumstances not admitted by Shearer or found true by a jury beyond a reasonable doubt, the trial court violated his Sixth Amendment

right to a jury trial in imposing the five-year upper term for his robbery conviction. (*Cunningham, supra*, 549 U.S. at p. 868; *Blakely, supra*, 542 U.S. at pp. 301-305.)

D

Considering the trial court could have properly relied on, at most, only one of the three factors it cited in imposing the five-year upper term for Shearer's robbery conviction, we are not persuaded on the record in this case that the trial court would nevertheless have imposed that upper term had it considered only the one valid aggravating factor (i.e., Shearer's prior criminal record). Assuming *arguendo* the lesser standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 applies to this aspect of determining prejudicial error (see, e.g., *People v. Price* (1991) 1 Cal.4th 324, 492 ["When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper."]), we believe it is reasonably probable the trial court would not have imposed that upper term had it considered only Shearer's prior criminal record and ignored his conduct during the March 2004 robbery and November 2004 incident that it described during sentencing. The trial court did not expressly state (or otherwise imply) it would have imposed the upper term based solely on Shearer's prior criminal record. Therefore, although one aggravating factor *may* be sufficient to support imposition of an upper term (see, e.g., *People v. Osband* (1996) 13 Cal.4th 622, 728), we conclude the trial court's reliance on the two inappropriate factors was prejudicial and therefore its imposition of

the five-year upper term for Shearer's robbery conviction must be reversed. Accordingly, we remand the matter for resentencing.

II

Unauthorized Sentence

Although, because of our remand for resentencing, we need not address Shearer's remaining contention, for purposes of guiding the trial court (and the parties and counsel) on resentencing, we nevertheless address that contention. Shearer asserts that because the trial court erred by relying, in part, on his conduct after the grant of probation in imposing the five-year upper term, that sentence must be reversed as unauthorized. As noted in part I, *ante*, one of the three factors on which the trial court relied was Shearer's conduct during the November 2004 incident that occurred while he was on probation for the March 2004 robbery. As he notes, at the time of his sentencing, California Rules of Court, rule 4.435(b) provided:

"Upon revocation and termination of probation pursuant to [Penal Code] section 1203.2, when the sentencing judge determines that the defendant shall be committed to prison:

"(1) If the imposition of sentence was previously suspended, the judge shall impose judgment and sentence after considering any findings previously made and hearing and determining the matters enumerated in rule 4.433(c).

"The length of the sentence shall be based on circumstances existing at the time probation was granted, and *subsequent events may not be considered in selecting the base term* nor in deciding whether to strike the additional punishment for enhancements charged and found." (*Italics added.*)

Because in June 2004 the trial court granted Shearer probation, he correctly asserts the trial court erred in relying, in part, on his conduct during the November 2004 incident in imposing the upper term for his March 2004 robbery.

However, during Shearer's sentencing neither he nor his counsel objected to the trial court's erroneous reliance on that factor in imposing the upper term. Therefore, Shearer waived that particular error for purposes of this appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) *Scott* stated:

"[T]he waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices. Included in this category are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons." (Scott, at p. 353, italics added.)

Scott explained its reasoning for application of the waiver doctrine to routine errors in a trial court's statement of reasons: "Although the [trial] court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention. As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them." (*Scott*, at p. 353.)

Shearer nevertheless asserts the trial court's error falls within *Scott*'s narrow exception to the waiver doctrine that applies in cases of "unauthorized" sentences. *Scott* stated:

"Although the cases are varied, *a sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case.* Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing. [Citation.]" (*People v. Scott, supra*, 9 Cal.4th at p. 354, italics added.)

We conclude the trial court's sentencing error in this case did *not* result in an "unauthorized" sentence. The five-year upper term imposed for his March 2004 robbery *could* have been lawfully imposed under the circumstances of this case. In particular, imposition of an upper term under California's determinate sentencing scheme is allowed if only one aggravating circumstance is found. (*People v. Osband, supra*, 13 Cal.4th at p. 728 ["Only a single aggravating factor is required to impose the upper term . . ."].) In this case, had Shearer objected at sentencing to the trial court's reliance on his conduct during the November 2004 incident and had the court corrected that error at sentencing, there nevertheless remained one other aggravating factor cited by the court on which it presumably could have based its imposition of the upper term (i.e., Shearer's prior criminal record). Therefore, the trial court's imposition of the five-year upper term for Shearer's March 2004 robbery did not constitute an "unauthorized" sentence. Accordingly, the *Scott* waiver doctrine applies to preclude Shearer from raising that purported sentencing error on this appeal.

Nevertheless, on remand for resentencing, Shearer's counsel may (and presumably will) object to any consideration by the trial court of Shearer's conduct after his June 2004 grant of probation, including any consideration of his conduct during the November 2004 incident that led to revocation of his probation. As discussed above, California Rules of Court, rule 4.435(b) precludes the trial court, in sentencing Shearer for the March 2004 robbery after revocation of his probation, from considering events subsequent to that grant of probation. Therefore, in resentencing Shearer on remand of this case, we expect the trial court will abide by that rule.

DISPOSITION

The judgment is affirmed, except that the sentence set forth in the judgment is reversed and the matter is remanded for resentencing consistent with this opinion.

McDONALD, Acting P. J.

WE CONCUR:

McINTYRE, J.

O'ROURKE, J.